No. 10937

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern District of California, and FRANCIS BIDDLE, Attorney General of the United States,

Appellees.

APPELLANT'S REPLY BRIEF.

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The Appellant Is Entitled to a Writ of Habeas Corpus on the Ground of Absence of Jurisdiction in the Trial Court Due to a Failure of Due Process in the Selective Service Procedure.

The brief of appellee endeavors to summarily dismiss the following statement of the Court[1]:

> ". . . Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error the writ of *habeas corpus* has of late

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[1]*Bagley v. United States,* 144 Fed. (2d) 788.

> years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the 'due process' question by resort to this remedial writ."

Appellee casually remarks:

> "It must be apparent that this Court referred to a denial of due process in the conviction but not to a denial of due process in the Selective Service classification." (Appellee's Brief, p. 4.)

Obviously, this Honorable Court was not hinting that it, for unstated (and unimaginable) reasons was overlooking a denial of "due process" in the conviction: Since *habeas corpus* cannot take the place of a writ of error, nor of a writ of certiorari the Court's reference to testing the "due process" question by resorting to this remedial writ could refer only to "due process" in the administrative procedure preceding the indictment.

Appellee states (Appellee's Brief, p. 4):

> "The controlling cases supporting appellee's contention that the writ of *habeas corpus* is not available to the appellant herein are:
>
> *"United States ex rel. Falbo v. Kennedy* and *United States ex rel. Lohrberg v. Nicholson* (CCA-4), 141 Fed (2d) 689, cert. denied 322 U. S. 744, 745; *United States ex rel. Arpaia v. Alexander* (CCA-2), decided January 22, 1945, ... Fed. (2d) ....."

The facts in the *Falbo v. United States* and in *Falbo v. Kennedy* cases were one and the same, and the grounds advanced for judicial relief were also identical, namely, misclassification by the Selective Service System.

By reason of the Supreme Court's decision in the former case, a second, identical attack on the propriety of the

classification, through a petition for a writ of *habeas corpus,* necessarily failed in the latter case.

Bagley, in the case at bar, does not attack the *propriety* of his classification, but does attack the *jurisdiction* of the Selective Service agencies and of the Court on the ground of failure of "due process."

The other cases referred to by appellees' brief, on pp. 4 and 5 are likewise distinguishable: In none but the *Schafer* case had the petitioner qualified for a judicial review, either by exhausting his administrative remedies or by offering to so exhaust them for the purpose of testing his rights. The *Schafer* case, however, is distinguishable on other points, as will be hereinafter set forth.

In none of the cases cited was there so serious a deprivation of rights as Bagley suffered: namely, that his Hearing Officer had completely misled him. [Tr. 7.]

Reviewed seriatim, appellee's cases are:

Ravin v. Cougen, (CCA-1), 141 Fed. (2d) 302; here the petition for a writ of *habeas corpus* was directed against the Marshal *before* trial. This situation is, of course, identical with our Ninth Circuit case of *Enge v. Clark,* 144 Fed. (2d) 638.

Ex Parte Catanzaro, (CCA-3), 138 Fed. (2d) 100, cert. denied 321 U. S. 793. This case merely held that the petitioner *had not qualified himself* for a judicial review. "To grant it to him at the point he has chosen would not, we believe, conform to the will of Congress." [p. 102.]

At this point it should be noted that Bagley, petitioner in the case at bar, has qualified himself for judicial review (so we submit), as our Opening Brief details on pp. 8, 9 and 10.

Noteworthy in this *Catanzaro* decision is the dissenting opinion of Circuit Judge Biggs, where it is pointed out:

> 1. Nowhere in the Act is it provided that everyone must obey any order of a draft board.
>
> 2. Categories of exempted registrants are set up by the Act.
>
> 3. If a registrant within one of these exempted categories is denied a fair hearing, or if his local board acts capriciously or arbitrarily or contrary to law in determining his status, the registrant (having exercised his administrative remedies to the full) is entitled to the benefits of the writ, if he is arrested for failure to obey the void order requiring him to report for induction.[2]

Catanzaro v. Hiatt, 55 Fed. Supp. 86. This case flatly states there is no right to a judicial review of the action of a Selective Service Board. However, this ruling must be considered in the light of the facts, namely, that the petitioner *had failed to report for induction,* and was therefore not qualified to ask for a judicial review.

Schafer v. Bezona, 54 Fed. Supp. 1019. The facts of this case most nearly approach those of the instant case, but they are distinguishable. First, the *Schafer* case was

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[2]Judge Biggs went on to say: "In a *habeas corpus* proceeding the court ought to look through the legalistic distinction which the majority would draw between the registrant's violation of the Act because of failure to obey the order and his violation of the order itself. The vital and fundamental thing is that the registrant has been deprived of his liberty because and only because of his refusal to obey an order which was wholly void since it was made without due process of law. Under such circumstances the name or nature of the agency or of the officer of the United States who holds him in custody is immaterial."

decided before this Court's rendition of the *Bagley v. United States* (*supra*) opinion and the trial court did not have the benefit of this Court's considered opinion; additionally, the trial court expressly referred to the possibility of a higher court passing on the problem posed. [p. 1022.]

> "If it is to be the law that erroneous advice by trained and experienced counsel is to be construed as a deprivation of an accused's day in court, it is essential that the initial statement of that rule shall emanate from a higher tribunal than this."

The facts also present a material difference in that *Schafer* violated an order to report to a C. P. S. Camp (conscientious objector's camp) whereas Bagley desires just such an order; the *Schafer* case did not present the problem of an objector who is conscientiously unable to submit to Army authority. Finally, the case at bar is not one, like the *Schafer* case, of an objector attacking a local board's *classification*; failure of *'due process'* is the critical distinction between them.

Conclusion.

The Order Dismissing the Petition for a Writ of *Habeas Corpus* should be reversed to permit the petitioner a means of testing whether or not he has been accorded due process.

Respectfully submitted,

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